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**In the Supreme Court of the United States**

OCTOBER TERM, 1984

SYDNEY M. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the courts below properly denied petitioner's motion for post-trial relief from his conviction for filing fraudulent income tax returns, based on the factual determination that the government had not illegally obtained evidence by deception of petitioner as he contended.

(1)



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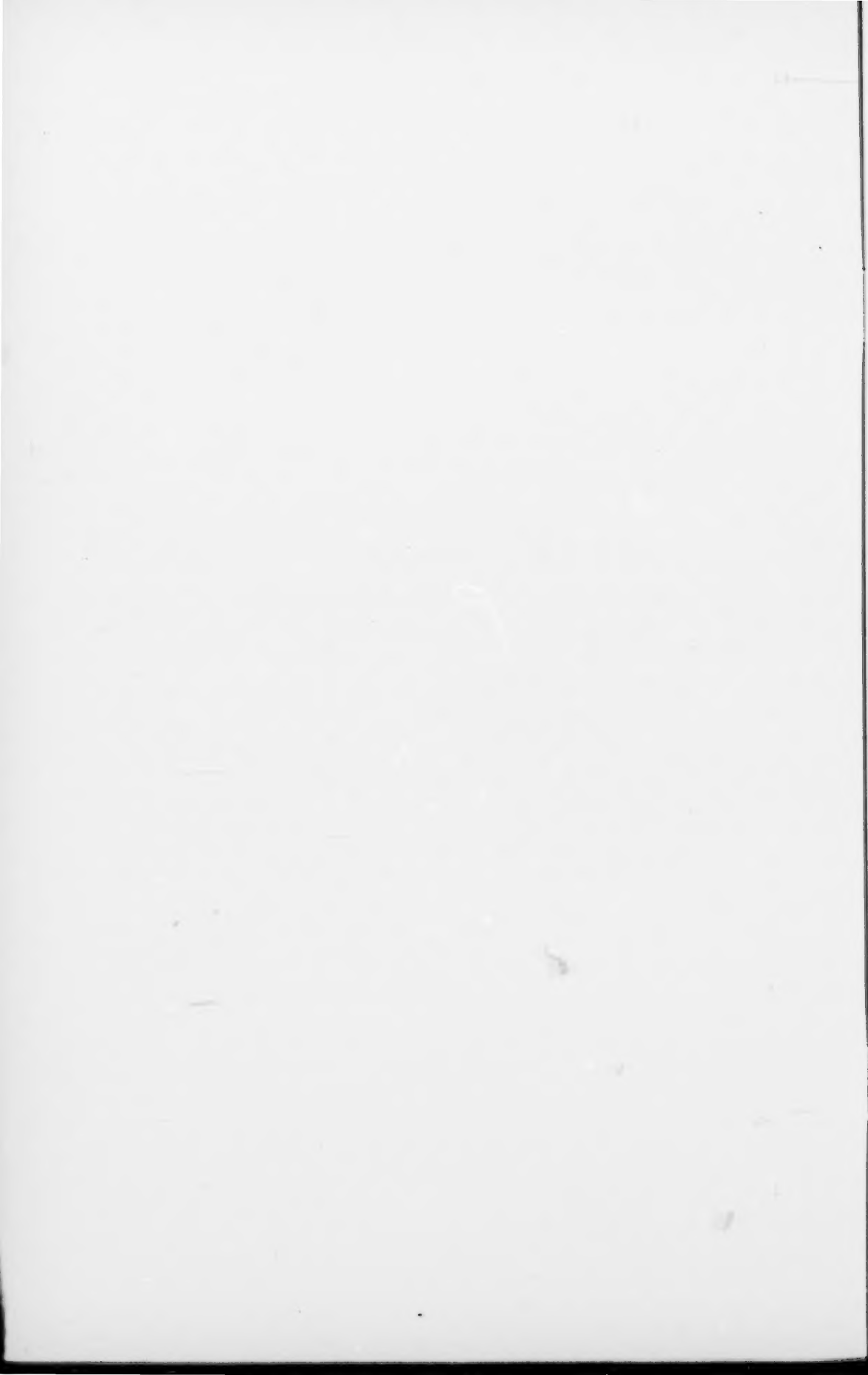
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## **OPINIONS BELOW**

The judgment order of the court of appeals (Pet. App. 96) is not officially reported. The memorandum orders of the district court (C.A. App. 5-21, 23-27; Pet. App. 68-95) are not officially reported.

## **JURISDICTION**

The judgment of the court of appeals was entered on November 28, 1983. A petition for rehearing was denied on February 15, 1984 (Pet. App. 97). On March 28, 1984, Justice Stevens extended the time within which to petition for a writ of certiorari to and including May 15, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a bench trial in 1976 in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of willfully filing fraudulent income tax returns for 1968-1970, in violation of 26 U.S.C. 7206(1). He was fined a total of \$7,000 on the three counts (C.A. App. 6). Four years later, he filed a motion for a new trial. The district court denied the motion in large part as untimely (C.A. App. 5-22). The district court treated one allegation thereof as presenting a request for coram nobis relief, but, after conducting an evidentiary hearing, found no grounds for granting relief (Pet. App. 68-95). The court of appeals affirmed on the basis of the district court's opinion.

Petitioner, a trial lawyer, was indicted on September 5, 1975 (C.A. App. 5). Prior to trial, a hearing was held on his motion to suppress certain evidence acquired from him by IRS Agent Kelly. Kelly was a member of the IRS Audit Division, which handles routine tax audits. Kelly conducted the initial examination of petitioner's tax returns; he eventually concluded that he had discovered evidence of fraud on petitioner's part and at that point referred the case to the IRS Intelligence Division, which handles cases with indications of possible criminal activity.<sup>1</sup> Petitioner contended that Kelly had obtained evidence from him, before making the formal referral to the Intelligence Division, under the guise of conducting a routine tax audit, when in fact the Intelligence Division was already interested in the case and was allegedly intending to bring criminal tax charges. Petitioner contended that the evidence should be suppressed because it had been obtained from him by deceit.

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<sup>1</sup>The Audit Division of the IRS is now called the Examination Division, and the Intelligence Division is now called the Criminal Investigation Division.

At the suppression hearing, Kelly testified that he had had two brief telephone conversations with Special Agent Howe, a member of the Intelligence Division, before formally referring the case for criminal investigation. Kelly explained that Howe had called him to make a routine inquiry about the status of the case, that Howe had not become involved in the case in any way, and that Howe had not given him any direction or advice about the investigation.<sup>2</sup> After considering this testimony, the district court denied petitioner's motion to suppress, ruling that, although the phone conversations might have been a technical violation of IRS internal administrative rules, which generally proscribe contacts between Audit and Intelligence Division personnel during a routine civil audit, there had been no prejudicial collusion or deception of petitioner in any way (Pet. App. 69-70, 74-75). Petitioner was tried to the court and convicted as charged in June 1976. His conviction was affirmed (567 F.2d 391 (7th Cir. 1977)), and this Court denied certiorari (435 U.S. 995 (1978)).

On June 2, 1980, petitioner moved for a new trial on the ground of newly discovered evidence. Because that motion was filed more than two years after the affirmance of his conviction, the district court denied the motion as untimely

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<sup>2</sup>Howe also testified at the suppression hearing to explain why he had made this inquiry of Kelly. Upon becoming a group manager in the Intelligence Division in January 1970, Howe had discovered an open "case development" file on petitioner. Howe explained that the Intelligence Division routinely seeks to develop potential fraud cases on its own, and that local media publicity about state bar disciplinary proceedings against petitioner had apparently prompted Intelligence Division personnel to check into his tax liability. Following routine procedure, Howe thereupon requested petitioner's tax returns, only to discover that they were already under examination by the Audit Division. Howe then called Kelly, ascertained the status of the case, and closed down the Intelligence Division's case development file (Pet. App. 69, 74-75).



(C.A. App. 5-22). Attached to the government's response to the motion, however, was an affidavit of Agent Kelly (C.A. App. 3-4) setting forth additional information about Kelly's contacts with the Intelligence Division during the early stages of the tax investigation. The district court viewed this information as creating a possible ground for issuing a writ of error coram nobis — relief that would not be barred by the two-year time limit on new trial motions — and held a five-day evidentiary hearing to explore that possibility (Pet. App. 68-70; C.A. App. 22-27).

At the coram nobis hearing, Kelly testified that, besides his two brief telephone contacts with Special Agent Howe, he and his group manager on one occasion had met with Special Agent Levin, another member of the Intelligence Division, and discussed a "hypothetical set of facts" based on petitioner's case without revealing petitioner's name (Pet. App. 70). The meeting was held, Kelly explained, in order to obtain advice as to the significance of a complicated stock transaction that petitioner had undertaken. The consensus reached at the meeting was that further information was necessary in order to draw any conclusion as to the significance of the stock transaction (*id.* at 78-79). Kelly further testified that Levin offered no directions or suggestions as to how the audit should be conducted and had no further contact with the audit until the case was formally referred to the Intelligence Division some months later. That referral was not based on the stock transaction but rather on other indications of fraud subsequently discovered in petitioner's records (*id.* at 79).

Kelly also explained at the coram nobis hearing why the fact of his meeting with Levin had not come to light before. Kelly referred to a point in the transcript of the pre-trial suppression hearing at which the district court, in the course of questioning Kelly about his telephone contacts with Special Agent Howe, had touched upon the issue of his contacts

with the Intelligence Division generally. At that point, Kelly had inquired, "Can I excuse — may I ask a question?" But the court pursued its previous line of inquiry, affording Kelly no distinct opportunity to ask his question. It was at that point, Kelly said, that he intended to bring his meeting with Levin to the court's attention. Kelly did not mention the matter again, and did not inform the government attorneys of his meeting with Levin until the time of petitioner's post-trial motion. Pet. App. 71-72.<sup>3</sup>

The two other IRS officials who attended the meeting with Kelly also testified at the coram nobis hearing. Kelly's group manager, while his memory was less than clear, supported Kelly's testimony.<sup>4</sup> Special Agent Levin, while his version differed from Kelly's as to a few particulars,<sup>5</sup> confirmed Kelly's description of the purpose and subject of the meeting, and confirmed that Levin did not thereafter have anything to do with Kelly's continuing civil audit (Pet. App. 81-83).

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<sup>3</sup>Several sentences from the portion of the district court's opinion dealing with this issue are omitted from petitioner's appendix. See Pet. App. 71. The full version appears in the appendix that petitioner filed in the court of appeals (at 3-4).

<sup>4</sup>The group manager, Fred Maul, had no specific recollection of the meeting. But he testified that, on the rare occasions when he and one of his agents would meet with a special agent to obtain advice on a "hypothetical case" basis, the name of the taxpayer would not be revealed. If the special agent expressed the opinion that the case should be referred to the Intelligence Division, Maul said, he would not permit his agent to continue the audit (Pet. App. 80-81).

<sup>5</sup>Levin believed that a second factual issue (besides the stock transaction issue) had been discussed, and that at the end of the meeting petitioner's name might have been used. The district court concluded that Kelly's version of the meeting was probably more accurate, but noted that its holding would be the same regardless of whose version were adopted. Pet. App. 83-86.

After reviewing this evidence at length, the district court found no reason to disturb petitioner's conviction (Pet. App. 83-94). The court determined (as it had done in the original suppression hearing) that the consultation between the Audit and Intelligence Divisions constituted a minor technical violation of internal IRS administrative guidelines. But the court found "no hint anywhere in the evidence" (Pet. App. 85) that the government had obtained information from petitioner by misrepresenting the nature of the investigation or by any other form of trickery or deceit. The court thus declined to grant petitioner *coram nobis* relief. The court of appeals affirmed in an unpublished order on the basis of the district court's opinion (Pet. App. 96).

#### ARGUMENT

Although petitioner presents nine overlapping questions for review, his central thesis is that his conviction should be set aside because Agent Kelly allegedly obtained from him by deception or trickery evidence later used against him at trial. This purely factual question was exhaustively considered by the district court in both the pre-trial and *coram nobis* proceedings, and it correctly concluded that no such improper government conduct had occurred. The court of appeals has twice concurred in that conclusion, and there is no basis for further review.

*Coram nobis* relief is an "extraordinary remedy." *United States v. Morgan*, 346 U.S. 502, 511 (1954). Such relief is appropriate only where a defendant demonstrates that his conviction was the product of "errors of fact \* \* \* of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Addonizio*, 442 U.S. 178, 186 (1979).

In this case, petitioner contends that his conviction was tainted by the use of evidence obtained from him in violation of the Fourth Amendment. The courts on a few occasions have held on direct appeal that, where government personnel intentionally misrepresent the nature of a tax investigation, evidence obtained as a result of such misrepresentation may be subject to suppression. *E.g.*, *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977). See also *United States v. Allen*, 522 F.2d 1229, 1233 (6th Cir. 1975), cert. denied, 423 U.S. 1072 (1976). Petitioner, however, failed to convince either court below that any such misrepresentation occurred here. Indeed, the district court found “no hint anywhere in the evidence of any actual fraud, trickery or deceit” (Pet. App. 85), nor any indication that the IRS Intelligence Division had “secretly entered the investigation to trick or mislead [petitioner] into revealing incriminating evidence” (*id.* at 86). The district court did conclude that, since IRS internal guidelines at that time directed that an Audit Division agent “should not discuss the taxpayer’s case with Intelligence prior to submission of the referral report,” a technical violation of those guidelines took place.<sup>6</sup> But the court correctly recognized (Pet. App. 85-86, 89) that the IRS Manual confers no rights on taxpayers and that such a technical violation would not of itself permit the suppression of evidence, much less justify the granting of extraordinary coram nobis relief. See, *e.g.*, *United States v. Caceres*, 440 U.S. 741 (1979).

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<sup>6</sup>See [2 Audit] Internal Revenue Manual (CCH) (Audit Technique Handbook) para. (10)91(7) (1969); C.A. App. 2. As the district court noted (Pet. App. 89-90), the Manual has since been revised to make it clear that routine, limited contacts between the Examination and the Criminal Investigation Divisions — *e.g.*, contacts for advice concerning a “type of case” — are permissible. The Manual, in other words, now specifically allows contacts substantially similar to those involved here.

Nor is there any merit to petitioner's related claim (see Pet. 19, 32) that Agent Kelly himself undertook an unauthorized criminal investigation and that he should have transferred the case to the Intelligence Division earlier. Provisions of the IRS Manual then in effect directed that a civil examiner refer a case to the Intelligence Division only after he had discovered "firm indications of fraud." [2 Audit] Internal Revenue Manual (CCH) (Audit Technique Handbook) para. (10)91(2) (1969); C.A. App. 3. The district court correctly concluded that Kelly had no firm indication of fraud on petitioner's part prior to the meeting with Levin; indeed, the consensus of that meeting was that further information was needed before one could properly evaluate a hypothetical transaction of the type petitioner engaged in (Pet. App. 78-79). As it turned out, Kelly never did find any firm evidence of fraud concerning that transaction, and he eventually based his referral to the Intelligence Division on other evidence of fraud subsequently discovered (*id.* at 79, 91).

Finally, the district court correctly noted that, regardless of what the IRS agents might have said to petitioner, he would almost certainly not have been "deceived" in any event. Petitioner was an experienced trial lawyer, licensed at that time to practice before the IRS, and he was never ignorant of the potential criminal consequences of the tax investigation. To this date, petitioner has not specified what evidence, assertedly turned over to Agent Kelly during the initial stage of the audit, he would have withheld had he suspected Intelligence Division involvement at that time. Indeed, the district court found that petitioner continued his practice of ready cooperation with the IRS even after Intelligence Division personnel actually did become involved upon formal referral of the case (Pet. App. 87).

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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